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Order 2000-9-21



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC**

Issued by the Department of Transportation
on the 8th day of September 2000

In the matter of

**U.S.-Colombia Combination
Service Proceeding (2000)**

Docket OST-2000-7655

FINAL ORDER

SUMMARY

By this order we make final our tentative decision in Order 2000-7-19 and award Delta Air Lines, Inc., certificate authority to operate scheduled combination service between Atlanta, Georgia, and Bogota, Colombia, and allocate it seven weekly combination frequencies for that service.

BACKGROUND

On March 15, 2000, delegations of the Government of the United States and the Government of the Republic of Colombia signed a Memorandum of Consultations that set forth the text of an understanding and amendments to the 1956 U.S.-Colombia Air Transport Agreement.¹

Specifically, with respect to scheduled combination services, the understanding and amendments provide that there will be no limitations on the number of airlines that may be authorized to serve the market. They further provide for an expansion in the number

¹ The delegations undertook to recommend that their governments adopt this understanding and these amendments. They further stated the intent of their respective aviation authorities to permit operations provided for in the understanding and amendments as of March 15, 2000, pending entry into force of the understanding and amendments through an Exchange of Notes.

of flights U.S. carriers may operate over a three-year period.² Effective March 15, 2000, U.S. carriers may operate an additional seven weekly frequencies.³

By Order 2000-7-19 the Department tentatively allocated the seven available frequencies to Delta Air Lines to operate scheduled combination service between Atlanta, Georgia, and Bogota, Colombia. The Department also tentatively awarded backup authority to Continental Airlines for service in the Houston-Cali market.

Objections to the show-cause order were due July 24, 2000. Answers to the objections were due July 31, 2000.

RESPONSIVE PLEADINGS

Delta filed comments in support of the Department's tentative decision. Continental and the City of Houston and the Greater Houston Partnership (the Houston Parties) filed objections to the Department's tentative decision. Delta filed a reply. Continental filed an answer to Delta's reply.⁴

Delta supports the Department's tentative decision, and states that the Department properly recognized the importance of authorizing service from a major hub gateway in order to maximize the online service benefits of an award. Delta stated that not only would Delta's Atlanta-Bogota services provide Atlanta travelers their first and only nonstop service to Colombia, but it would also provide an unprecedented number of new and competitive nonstop-to-nonstop connecting services to all areas of the country. Delta states that with the addition of Colombia and its proposed Santiago service, Delta will serve 16 destinations in Latin America from its Atlanta hub with 217 weekly flights.

Continental states that the Department must institute further proceedings to develop a factual record on the benefits of the two proposals. Continental also states that adding seven additional frequencies would neither significantly develop new U.S.-Bogota traffic nor expand the range of service options available to consumers other than the small number of Atlanta consumers who would receive nonstop Bogota service for the first time. Continental argues that there are hubs at New York/Newark, Houston, and Miami, offering competitive online connecting service for U.S.-Bogota travelers and shippers.

² American Airlines and Continental Airlines are the two U.S. carriers currently designated to provide scheduled combination services. These carriers collectively now operate 49 weekly frequencies in the market.

³ See Order 2000-7-19 for a detailed description of the March 2000 MOC.

⁴ Continental's pleading was accompanied by a motion for leave to file an otherwise unauthorized document. Delta filed an answer stating that Continental's motion should be denied, and Continental filed a reply to that answer. Both of these pleadings were accompanied by motions for leave to file otherwise unauthorized documents. In the interest of a complete record, we will accept all the pleadings into the record.

Continental argues, therefore, that the addition of a single daily frequency at an additional hub by Delta serving the same traffic would provide only marginal service benefits by giving passengers a sixth daily online option. On the other hand, Continental maintains that no other airline today competes with American for U.S.-Cali traffic while five other airlines offer U.S.-Bogota service. In these circumstances, Continental argues that its selection would provide greater service and competitive benefits and that a full evidentiary proceeding would enable the Department to consider the actual adverse effects of continuing American's monopoly on U.S.-Cali service.

The Houston Parties state that by awarding the frequencies to Continental the Department would ensure that the central and western regions of the United States will have the benefit of adequate service to Colombia. They further state that award of the frequencies without an evidentiary proceeding does not give Continental and the Houston Parties an opportunity to present a complete case setting forth the many benefits of service between Houston and Cali.

In its answer, Delta states that neither Continental nor the Houston Parties raise an issue of material fact or identify any defects in the Department's procedures that would warrant disturbing the findings of the show-cause order, or justify initiation of further evidentiary proceedings.

In its further response, Continental argues that Delta has introduced further factual errors with respect to Continental's Latin America service record and reiterates its argument for further evidentiary procedures in this case.

FINAL DECISION

We have decided to make final our tentative decision in Order 2000-7-19 and to award Delta Air Lines certificate authority to operate scheduled combination service between Atlanta, Georgia, and Bogota, Colombia, and allocate it seven weekly combination frequencies for that service.

The U.S.-Colombia market is the third largest U.S.-South America market, generating over one million passengers for the year ending June 1999.⁵ Until the recent MOC and related amendments to the 1956 aviation agreement, U.S. carrier services have been limited to only two airlines and those services have been subject to frequency limitations. In light of these long-term restrictions, we recognized in our show-cause order the service and competitive benefits of using the first opportunity under the transitional service period to authorize another airline to serve this important market. Specifically, we noted that Delta would be the third U.S. carrier to serve Colombia and would offer service from

⁵ T-100 reports filed with the Department.

a new U.S. gateway, thereby increasing the number of U.S. cities receiving nonstop service and enhancing the range of price and service options available to consumers in the U.S.-Colombia market. Furthermore, we noted that Delta's proposed service through its major hub at Atlanta would benefit local passengers in the Atlanta-Colombia market, and would provide connecting passengers a convenient gateway for connections to Colombia in competition with the services of Continental at Newark and Houston and American at Miami. As noted in the record, and not refuted by any party, Delta offers over 900 daily flights to more than 160 destinations from its Atlanta hub.⁶ We also cited the significant structural benefits that would derive from Delta's selection.

We have carefully reviewed the objections to our show-cause order. Neither Continental nor the Houston Parties has presented new evidence or arguments that persuade us to modify our tentative decision.

Continental objects that our award to Delta would "neither develop the U.S.-Colombia market nor significantly expand the range of service options available to consumers." (Continental objections at 2). To the contrary, authorizing a new U.S. carrier to enter the U.S.-Colombia market—a market long limited to service by only two U.S. incumbents—will certainly provide the opportunity to develop the market, enhance competition and expand the service options available. This is all the more so given that the third U.S. carrier will be serving from its principal hub, where it has an established track record of developing service to other Latin America markets and expanding the service options to the traveling public.

Continental then goes on to assert the benefits of its own proposal, and in this it is echoed by the Houston Parties. However, in making our tentative decision we fully recognized—and indeed, expressly acknowledged (Order 2000-7-19 at 6)—the benefits of Continental's proposal. We tentatively determined, however, that those benefits were outweighed by those of Delta, and neither Continental nor Houston has provided any persuasive new evidence or argument that would lead us to conclude otherwise now.

We note that additional frequencies will become available over the next two years for U.S. carrier services, and Continental will be free to pursue its Houston-Cali proposal at that time.

Finally, Continental and the Houston Parties again assert that the Department did not have an adequate record on which to base a decision and that additional evidentiary procedures were required.⁷ We see no need for further procedures here. When we

⁶ March 20, 2000 application of Delta Airlines, April 20, 2000 answer of the Georgia and Atlanta Parties, and July 24, 2000 comments of Delta Air Lines.

⁷ Continental also identified two aspects of the Department's show-cause order where Continental contends that the Department made factual errors. First, Continental has suggested that our show-cause order was in error because we did not include a description of services in the U.S.-Bogota market by other foreign airlines. Continental's more expansive description of U.S.-Bogota service points up the competitive

issued our show-cause order we said:

Both carriers have presented full descriptions of their proposed services and arguments in support of their proposals. In addition, all parties have had a full opportunity to comment on each applicant's proposal. We perceive no unresolved issues of relevant fact that would benefit from further evidentiary procedures here.⁸

Given the information and arguments presented, we find that the record is adequate to proceed to a final decision in this case. Following our show-cause order, the parties have had still further opportunities to present comments and arguments on each applicant's proposal, and in fact they have done so. In these circumstances, we are convinced that we have before us an adequate record for a final decision and that no meaningful public interest purpose would be served by adopting further evidentiary procedures.⁹

CERTIFICATE AUTHORITY AND STARTUP CONDITIONS

As proposed in the show-cause order, we will issue Delta a five-year experimental certificate of public convenience and necessity for service in the Atlanta-Bogota market, and we will require institution of service by Delta within 120 days after the service date of this order. Also, as proposed, we will award Continental backup authority.¹⁰ We will make the backup award effective for a one-year period from the service date of this order. In addition, we proposed to subject both Delta's primary allocation of frequencies and Continental's backup award to our standard 90-day dormancy condition whereby the frequencies allocated would expire and revert automatically to the Department if not used for a period of 90 days. Both carriers have proposed service on a year-round basis. The 90-day period will begin on the carriers' required startup date, or the date on which the carrier begins service, whichever is earlier.

presence of still further foreign carrier operations and further convinces us of the need for additional competitive U.S. carrier service. Second, Continental has correctly pointed out that one reference in the show-cause order (page 5) noted U.S. carrier U.S.-Colombia service from only two U.S. gateways. It was clear from the text of the order prior to that reference that service is now provided from three U.S. gateways—Newark, Houston, and Miami. In these circumstances, we do not view this inadvertent omission as decisionally significant in this case.

⁸ Order 2000-7-19 at 6-7, footnote omitted.

⁹ We note that the procedures followed here are effectively the same as those we have used before in other comparable proceedings, including proceedings where Continental has participated and been the selected carrier. *See, e.g.,* the Cleveland-London case, Order 98-10-19. While Continental has argued that the Cleveland-London case is not apposite because it did not involve a choice between different foreign cities, we have also used simplified procedures in cases involving new entrant cases and/or involving different city-pair proposals. *See, e.g.,* U.S.-Japan Combination Services Proceeding, Orders 98-5-17 and 98-3-15, and U.S.-China Frequency Allocation Proceeding, Orders 95-2-30 and 94-12-7.

¹⁰ Continental holds certificate authority on Route 645 to serve the Houston-California market.

ACCORDINLGY,

1. We make final our tentative findings and conclusions in Order 2000-7-19;
2. We issue, in the form attached, a certificate of public convenience and necessity to Delta to provide scheduled foreign air transportation of persons, property, and mail between Atlanta, Georgia, and Bogota, Colombia;
3. We select Continental Airlines, Inc., as backup for scheduled combination service between Houston, Texas, and Cali, Colombia;
4. We allocate Delta Air Lines, Inc., seven weekly frequencies to perform its authorized operations in the Atlanta-Bogota market, and seven weekly frequencies to Continental Airlines, Inc., for Houston-Cali service should its backup award be activated;
5. Subject to the provisions of ordering paragraph 4 above, the frequencies allocated here are effective immediately and shall remain in effect indefinitely, provided that the carrier continues to hold the necessary underlying economic authority to serve the authorized market and are further subject to our standard condition that we may amend, modify, or revoke the allocation at any time and without hearing, at our discretion;
6. The frequencies allocated here are subject to the condition that the frequencies will expire automatically and will revert to the Department for reallocation if they are not used for a period of 90 days;¹¹
7. We grant all motions for leave to file an otherwise unauthorized documents in this docket;
8. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order and the attached certificate shall become effective upon the 61st day after its submission for section 41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove the Department's order under that section, whichever occurs earlier;¹²
9. We may amend, modify, or revoke the authorities granted by this order at any time at our discretion without notice or hearing; and

¹¹ Subject to the startup conditions imposed in the attached certificate and backup award, the dormancy period will begin upon inauguration of service by the carrier.

¹² This order was submitted for section 41307 review on September 8, 2000.

On September 20, 2000, we received notification that the President's designee under Executive Order 12597 and its implementing regulations did not intend to disapprove the Department's order.

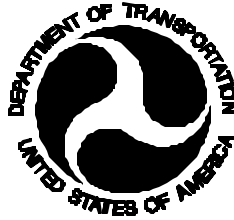
10. We will serve this order on Delta Air Lines, Inc.; Continental Airlines, Inc.; the City of Houston and the Greater Houston Partnership, the Ambassador of Colombia in Washington, DC; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration (AFS-220).

By:

SUSAN MCDERMOTT
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
http://dms.dot.gov/reports_aviation.asp*



Experimental Certificate of Public Convenience and Necessity

For Route

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This Certifies that

Delta Air Lines, Inc.

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

**Issued by Order 2000-9-21
On September 8, 2000
Effective on September 20, 2000**

**Susan McDermott
Deputy Assistant Secretary for
Aviation and International Affairs**

Terms, Conditions and Limitations

Delta Air Lines, Inc. for **Route**

is authorized to engage in scheduled foreign air transportation of persons, property, and mail:

Between Atlanta, Georgia, and Bogota, Colombia.

This authority is subject to the following conditions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any order of the Department of Transportation issued under them. To the extent that the holder has authority to serve more than one country or points in more than one country on the same route segment, that authority does not confer upon the holder any additional rights (including fifth-freedom intermediate and/or beyond rights) in limited-entry markets unless the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights and has notified the foreign country(ies) involved that any such selected carrier(s) has the required authority. In such cases, the fact that the carrier may hold authority to serve the countries (points) at issue on the same segment will not be considered as providing any preference to the holder in a carrier selection proceeding.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.
- (4) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative and low-priced air transportation it proposed in its application for authority.

(5) The holder's authority is effective only to the extent that such operations are also authorized by the Federal Aviation Administration (FAA), and comply with all FAA requirements concerning security.

(6) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. § 40102(a)(15).

(7) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of 49 U.S.C. or the Department's regulations shall be sufficient grounds to revoke this certificate.

(8) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.

(9) In the event that the holder ceases all operations for which it was found "fit, willing, and able," its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

(10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions, provided, that such operations are consistent with the applicable bilateral aviation agreements; and provided further, that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a request by any carrier to use the limited-entry route rights that are included in the holder's authority by virtue of the route integration authority granted here, but not being used, the holder of such authority by route integration will not be considered as providing any preference for the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

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This certificate shall become effective on September 20, 2000. It shall expire January 19, 2001; provided, however, that if the holder inaugurates service under this certificate on or before that date, the authorization will continue in effect until five years after its effective date unless the Department earlier suspends, modifies, or deletes the authority.